Supreme Court, U.S.
FILED
JAN 23 2009
OFFICE OF THE CLERK

No. 08-694

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,

v.

RAMBUS INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Trade Commission ruled that Rambus violated Section 2 of the Sherman Act, 15 U.S.C. § 2 by not disclosing to a standard-setting organization (SSO) that it intended in the future to seek patent protection for technologies it invented that the SSO was considering for inclusion in standards (and eventually adopted). The Commission did not find that the SSO would have adopted different technologies or standards if Rambus had disclosed its future patent intentions. The court of appeals ruled that the Commission had therefore not proven that Rambus's nondisclosure injured competition. The questions presented are:

1. Whether the court of appeals correctly vacated the Commission's determination that Rambus violated Section 2 by failing to disclose its future patent intentions, when the Commission did not find that the failure to disclose affected the standards chosen by the SSO, excluded rivals, or raised entry barriers, and therefore did not find that the failure to disclose caused Rambus's monopoly.

2. Whether the court of appeals correctly concluded that Rambus's nondisclosure could not be found to violate Section 2 solely on the ground that it enabled Rambus to avoid an SSO's rule that would have constrained its pricing.

CORPORATE DISCLOSURE STATEMENT

Respondent has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The Federal Trade Commission seeks review of a unanimous decision of the United States Court of Appeals for the District of Columbia Circuit that applied well-established, uncontroversial principles to set aside a determination by the Commission that Rambus had violated Section 2 of the Sherman Act. The court of appeals held that the Commission's determination was erroneous because the Commission did not find that the allegedly unlawful conduct, which ended more than twelve years ago, excluded rivals, raised entry barriers, or caused Rambus's monopoly. The court also discussed at length other fundamental problems with the Commission's determination. The court subsequently

denied the Commission's request for rehearing en banc, 11-0. The decision of the court of appeals was correct; there are no conflicts among the circuits; and the Solicitor General declined to file a petition for certiorari on behalf of the Commission. The petition should be denied.

1. Rambus was founded in 1990 by two engineering professors, Mike Farmwald and Mark Horowitz. In the late 1980s, Farmwald realized that memory chips were not keeping pace with increases in computer processing speeds. The resulting "memory bottleneck" threatened to impede advances in the computer industry. Farmwald and Horowitz invented new computer memory interface technologies and, in 1990, filed a patent application describing those inventions. *See* Pet. App. 5a-6a.[1] Their inventions vastly increased the usefulness of Dynamic Random Access Memory (DRAM), which is an essential component of most personal computers and other electronic devices.

While Rambus was seeking patent protection for those inventions, the computer memory industry was working to standardize DRAM technologies through a standard-setting organization (SSO) known as the JEDEC Solid State Technology Association (JEDEC). JEDEC's members included manufacturers, such as IBM, Infineon, Micron, and Samsung, that compete with one another, as well as non-manufacturing companies, such as Rambus, that obtain income by licensing

[1] Rambus's original patent application contained so many different patentable inventions that the Patent and Trademark Office (PTO) required Rambus to separate them into different applications. On March 5, 1992, Rambus split the claims between the original and ten "divisional" applications. Pet. App. 467a-468a.

their inventions and providing services to manufacturers.

Rambus attended its first JEDEC meeting as a guest in December 1991 and joined JEDEC early in 1992, by which point JEDEC had already begun considering a DRAM standard that became known as synchronous DRAM (SDRAM). At that time, JEDEC had no rule requiring members to disclose intellectual property, and JEDEC's members guarded their intellectual property interests jealously.[2] JEDEC's Manual of Organization and Procedure did not refer to any obligation that members disclose intellectual property. Although two publications discussed what committees should do about known patents, they did not address pending patent applications or intentions to file or amend applications in the future. Pet. App. 621a.

Rambus attended JEDEC meetings but did not participate actively in JEDEC's standard-setting activities. Rambus never promoted or advocated the inclusion of any technologies in any JEDEC standard, and it never voted in favor of any technologies. Pet. App. 501a-502a, 922a.

In March 1993, a JEDEC committee voted to forward a standard for SDRAM to the JEDEC Council for approval. The Council adopted the standard on May 24, 1993. At that time, Rambus had no issued patents or undisclosed claims in pending patent applications that

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[2] Rambus protected its as-yet-unpatented inventions by entering into nondisclosure agreements with prospective licensees. Pet. App. 449a-450a. Outside counsel advised Rambus to keep confidential its patent applications, which the company consistently treated as trade secrets. *Id.* at 662a-664a.

manufacturers would have had to license in order to practice the SDRAM standard. Pet. App. 669a.

In October 1993, after adopting the SDRAM standard, JEDEC published a revised manual, which directed committee chairs to "call attention to the obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking." Pet. App. 572a-573a. As the court of appeals observed, even if this language obligated (rather than encouraged) JEDEC members to disclose issued patents and pending patent applications, it "says nothing of unfiled work in progress on potential amendments to patent applications." *Id.* at 23a. In litigation between Rambus and a DRAM manufacturer, the Federal Circuit found that JEDEC never required its members to disclose their "plans or intentions" to file or amend patent applications in the future. *See Rambus Inc.* v. *Infineon Techs. AG*, 318 F.3d 1081, 1102, 1105 (Fed. Cir. 2003).

In October 1995, JEDEC circulated a "survey ballot" that inquired about the technical benefits from including technologies in a next-generation DRAM standard. Survey ballots were "straw votes" designed to solicit early input on possible future standardization efforts. The October 1995 survey ballot did not ask members to disclose any patent interests. Pet. App. 25a.

Rambus attended its last JEDEC meeting in December 1995 and formally notified JEDEC of its withdrawal by letter on June 17, 1996. The first presentation at JEDEC on the eventual next-generation standard—known as DDR SDRAM—did not occur until six months after Rambus's withdrawal. The committee did

not approve the standard until March 1998, and JEDEC did not publish the standard until August 1999. Pet. App. 7a, 100a-101a, 104a.

2. While JEDEC was working slowly toward adopting the DDR SDRAM standard, Rambus filed continuation patent applications with new claims better capturing the range of inventions disclosed in its initial application. In doing so, Rambus followed well-accepted patent practice; a patent applicant may amend claims in the PTO based on marketplace developments so long as the patent's original written description shows that the inventor was in possession of any later-claimed inventions when he filed the original application. *See, e.g.*, *Kingsdown Med. Consultants, Ltd.* v. *Hollister, Inc.*, 863 F.2d 867, 874 (Fed. Cir. 1988).

Rambus continued, after it withdrew from JEDEC, to file applications based on the inventions described in its initial 1990 application. These applications began maturing into issued patents in 1999, and Rambus offered to license its patented technologies to DRAM manufacturers shortly thereafter. Rambus filed its first patent-infringement suit in January 2000, after a manufacturer refused to accept a license.

Rambus never had any undisclosed issued or pending patent claims that read on any existing or proposed JEDEC standard while it was a JEDEC member. Rambus has never sued to enforce any patents that issued, or any patent claims for which it applied, while it was a JEDEC member. All the patents that Rambus has sued to enforce that cover technologies included in JEDEC standards were based on applications that

Rambus filed after it withdrew from JEDEC.[3] The Commission's case thus necessarily rests on the contention that Rambus improperly failed to disclose, while it was a member of JEDEC, its *intention* to file, *in the future*, patent claims that (if they issued and were valid) Rambus believed would cover technologies then under consideration at JEDEC (*see* Pet. App. 22a). That is what the Commission's nebulous term "patent interests" (Pet. 3) means in this case.

3. The Commission instituted this proceeding in 2002. Its complaint alleged that Rambus had engaged in unlawful monopolization by failing to disclose its patent interests relating to DRAM standards under consideration by JEDEC. Pet. App. 417a-418a. The proceeding was formally brought under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, but the Commission decided the case solely under the standards applicable to a monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* Pet. App. 12a.

After a trial involving 44 witnesses and more than 700 exhibits, the Administrative Law Judge (ALJ) ruled in favor of Rambus on several independent grounds. Pet. App. 387a-979a. The ALJ found that JEDEC's policies at most encouraged the voluntary disclosure of patents by JEDEC members (*id.* at 620a-

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[3] Despite the Commission's suggestion to the contrary (Pet. 7), the patent claims that Rambus filed after it left JEDEC were not based on nonpublic information Rambus obtained while a member of JEDEC. Indeed, the pertinent standards and JEDEC minutes discussing the proposed standards were made public before those claims were filed. *Infineon*, 318 F.3d at 1085; Pet. App. 490a, 507a.

621a) and did not impose any obligation to disclose patents, patent applications, or intentions to file or amend patent applications (*id.* at 621a-622a). The ALJ also found that Rambus did not have any undisclosed patents or patent applications that it should have disclosed under any JEDEC policy and that there was "no basis" to conclude that Rambus violated any disclosure duty. *Id.* at 664a-676a. The ALJ further concluded that Rambus had a "legitimate business justification" for treating its patent applications and intentions as confidential trade secrets, to preserve their value in the marketplace. *Id.* at 697a-705a. Finally, the ALJ exhaustively analyzed the alternative technologies that JEDEC might have selected and concluded that Complaint Counsel had failed to prove that any of them was viable. *Id.* at 757a-787a. Thus, the ALJ concluded, Complaint Counsel had not proven that Rambus acquired its monopoly "as a result of" any unlawful conduct. *Id.* at 940a.[4]

4. The Commission reversed the ALJ. Pet. App. 225a-226a. It concluded that Rambus had engaged in unlawful monopolization by failing to disclose, in "disregard [of] JEDEC's policy and practice [and] the duty to act in good faith," "the potential that Rambus would be able to impose royalty obligations" on DRAM manufacturers. *Id.* at 33a, 224a. The Commission did not find that any JEDEC rule explicitly required members to disclose their "patent interests." But the Commission concluded that the "cooperative" nature of JEDEC gave its members—who are otherwise fierce competitors—an "expectation" that members would act in

[4] The ALJ also found that Rambus's royalties were reasonable and nondiscriminatory. Pet. App. 826a-837a.

"good faith" towards one another by disclosing their patents and patent applications relating to technologies under consideration for incorporation into a standard. *Id.* at 136a, 138a. The Commission did *not* find, however, that JEDEC members had any specific expectation of disclosure of intentions to file or amend patent applications in the future. *See id.* at 22a. The Commission called Rambus's failure to tell DRAM manufacturers about its patent interests "deception." Pet. App. 138a.[5]

The Commission did not find that, if Rambus had disclosed its patent interests, JEDEC would have standardized different technologies. The Commission concluded only that there was sufficient evidence to support "a *prima facie* showing of a causal link between Rambus's conduct and its [monopoly] power." Pet. App. 149a. The Commission then shifted to Rambus the burden to prove that its nondisclosures had *not* caused JEDEC to adopt its technologies, and concluded that Rambus had failed to carry that burden. *Id.* at 161a-184a.

The Commission also did not find that, if Rambus had made the disclosures, JEDEC would have either reexamined its standards or instituted *ex ante* bargaining with Rambus over actual royalty rates.[6] Rather, the Commission believed that JEDEC would have been

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[5] The Commission also characterized certain statements and actions by Rambus as "deceptive," but it made no finding that any of those statements or actions had anything to do with JEDEC's adoption of the standards at issue. *See* Rambus C.A. Reply Br. 5-8.

[6] The Commission referred to the *theoretical possibility* of such processes (Pet. 4-5, 11) but made *no finding* of such activities.

obligated by its rules to request that Rambus commit to charge "reasonable and nondiscriminatory" (RAND) royalties, without any elucidation of what such royalty rates would have been. Pet. App. 114a, 187a. The Commission thus "infer[red]" that, had Rambus disclosed its patent interests, "JEDEC *either* would have excluded Rambus's patented technologies from the JEDEC DRAM standards, *or* would have demanded RAND assurances, with *an opportunity* for *ex ante* licensing negotiations." *Id.* at 150a (emphases added).

After further briefing on remedy issues, the Commission ordered Rambus to license its patented technologies at royalty rates far below its customary rates for three years, and then to license them for free. Pet. App. 302a-306a. In reaching that conclusion, the Commission acknowledged that Complaint Counsel had failed to prove that JEDEC would have chosen alternative technologies had Rambus disclosed its patent interests (*id.* at 284a) and thus proceeded on the premise that Rambus's technologies would have been chosen anyway. The Commission concluded that, if the disclosures had been made, JEDEC would have insisted that Rambus commit to licensing on RAND terms and Rambus would have agreed to do so. The Commission made no finding as to what JEDEC members believed a RAND commitment would have meant. *See id.* at 292a-296a.

5. The court of appeals set aside the Commission's decision and held that its findings, even if supported in fact, did not establish a violation of Section 2. Pet. App. 1a-26a.

Reviewing this Court's and its own case law, the court of appeals first noted that "the mere existence of a monopoly does not violate the Sherman Act," and that

a Section 2 violation requires proof of " 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.' " Pet. App. 12a (citing, *inter alia*, *Verizon Commc'ns, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc). The court further observed that, "to be condemned as exclusionary, a monopolist's act must have 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice." *Id.* at 13a (citing, *inter alia*, *Trinko* and *Microsoft*). And, the court noted, "it is the antitrust plaintiff—including the Government as plaintiff—that bears the burden of proving the anticompetitive effect of the monopolist's conduct." *Id.* (citing *Microsoft*).

Applying those settled principles to the case at hand, the court concluded that the Commission had not established that Rambus's nondisclosures had had an anticompetitive effect. The Commission did state that, if Rambus had made the supposedly required disclosures, then JEDEC *either* would have excluded its technologies *or* would have demanded an assurance of licensing on RAND terms. But, the court stressed, "the Commission did not determine that one or the other of those two possible outcomes was the more likely." Pet. App. 13a. Indeed, the court observed, "the Commission made clear in its remedial opinion that there was insufficient evidence that JEDEC would have standardized other technologies had it known the full scope of Rambus's intellectual property." *Id.* at 14a. Thus, the court concluded, it could sustain the Commission's determination of a Section 2 violation

only if the second outcome—avoiding "assurances from Rambus of RAND licensing terms"—itself constituted the required harm to competition. *Id.*

The court then concluded that merely avoiding a pricing commitment is insufficient to establish the requisite "anticompetitive effect" for a Section 2 violation. The court distinguished between conduct that affects the structure of a market by harming rivals and thus diminishing competition and conduct that "raises the price secured by a seller, but does so without harming competition," which "is beyond the antitrust laws' reach." Pet. App. 15a. The court explained that "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition." *Id.* at 16a. As an example, the court pointed to *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998), where this Court concluded that a utility's scheme to "hoodwink[] the regulators" and thus "raise[] prices for consumers," without causing a "less competitive market" for the services the monopolist was offering, did not raise antitrust concerns. Pet. App. 16a-17a.

For similar reasons, the court distinguished the Third Circuit's decision in *Broadcom Corp.* v. *Qualcomm Inc.*, 501 F.3d 297 (2007), where that court "held that a patent holder's intentionally false promise to a standard-setting organization that it would license its technology on RAND terms, 'coupled with [the organization's] reliance on that promise when including the technology in a standard,' was anticompetitive conduct, on the ground that it increased 'the likelihood that patent rights will confer monopoly power on the patent holder.'" Pet. App. 18a-19a (quoting *Broadcom*, 501 F.3d at 314). As the court below noted, the *Broadcom* decision "rested on the argument that deceit lured the

SSO away from non-proprietary technology" and thus affected the structure of the technology market, whereas, in this case, the Commission explicitly stated that it could not find Rambus's nondisclosures had had such an effect (*id.* at 19a). Because "the Commission expressly left open the likelihood that JEDEC would have standardized Rambus's technologies *even if Rambus had disclosed* its intellectual property," JEDEC "lost only an opportunity to secure a RAND commitment from Rambus," and "loss of such a commitment is not a harm to competition from alternative technologies in the relevant markets." *Id.*

Because the court concluded that Rambus's nondisclosures did not have an anticompetitive effect, it was not required to decide whether those nondisclosures violated any disclosure duty. The court went on, however, to explicate at length its "serious concerns about [the] strength of the evidence relied on to support some of the Commission's crucial findings regarding the scope of JEDEC's patent disclosure policies and Rambus's alleged violation of those policies." Pet. App. 21a. First, the court noted that no JEDEC policy appeared to require disclosure of "not merely [members'] relevant patents and patent applications, but also their work in progress on amendments to pending applications that included new patent claims." *Id.* at 22a. Second, because the Commission's case appeared to rest not on formal JEDEC disclosure policies but on JEDEC members' "expectations," the court expressed concern about "the vagueness of any such expectations," especially given that JEDEC was composed of marketplace rivals who would normally be expected to "vigorously protect" their intellectual property as trade secrets; indeed, the court noted that disclosure of those trade secrets among competitors "itself implicates anti-

trust concerns." *Id.* at 23a-24a.[7] Finally, the court noted that the Commission's case with respect to the DDR SDRAM standard was particularly weak given that the supposed nondisclosure came at a very early stage of development of the standard (*id.* at 25a) (and Rambus left JEDEC long before the standard was adopted, *see* p. 4, *supra*).

6. The Commission's petition for rehearing en banc was denied, 11-0. Pet. App. 380a-381a.

ARGUMENT

The court of appeals applied well-settled principles to conclude that (a) the Commission's findings were insufficient to establish that Rambus's nondisclosure affected the structure of any market and (b) any effect that Rambus's nondisclosures might have had on pricing alone was insufficient to establish a Section 2 violation. Those rulings do not conflict with any decision of this Court or any other court of appeals or with the academic commentary cited by the Commission. The Commission's submission that the decision below raises grave implications for antitrust enforcement is wide of the mark; indeed, the Solicitor General, who would certainly be concerned with antitrust enforcement by the Commission and the Justice Department, declined to seek this Court's review.[8] The court of appeals also

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[7] The court echoed an observation by the Federal Circuit that "JEDEC's patent disclosure policies suffered from 'a staggering lack of defining details.' " Pet. App. 23a-24a (quoting *Infineon*, 318 F.3d at 1102).

[8] There is no basis for the assertion by amici Hynix, et al., that the Solicitor General "already has informed the Court that Rambus's deceptive conduct amounts to an archetypical 'patent hold-up' " (Hynix Br. 19). The cited Solicitor General amicus brief

noted several serious concerns about the factual underpinnings of the Commission's case. Further review by this Court is not warranted.

A. The Court Of Appeals' Decision Is Correct

As the court of appeals recognized, this case is controlled by two basic principles. First, Section 2 is directed at conduct that injures competition by excluding rivals by, for example, restricting their ability to enter the market or raising their costs. *See* Pet. App. 15a; *see also Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-225 (1993) (antitrust laws do not "create a federal law of unfair competition" but rather are concerned with whether improper conduct "would monopolize a particular market") (internal quotation marks omitted); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993) ("§ 2 makes the conduct of a single firm unlawful only when it actually monopolizes or ... threatens to do so"); *Microsoft*, 253 F.3d at 58.

Second, the burden of proving this element of a Section 2 violation—namely, that the defendant's conduct actually had an exclusionary effect—rests with the plaintiff. Not only has this Court expressly stated that the burden of proof in antitrust cases rests with the

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(from the *eBay* case) discussed generally what a "hold-up scenario" might be but nowhere suggested that Rambus in fact had engaged in such a hold-up; that would have been a most peculiar assertion in an amicus brief, in a case not involving Rambus, concerning standards for issuance of a permanent injunction against patent infringement. Moreover, the Solicitor General stressed a number of equitable principles in *patent* law that can address concerns about patent hold-up and make antitrust intervention unnecessary. *See* 05-130 U.S. Br. 21-22.

plaintiff, *see United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967),[9] but "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims" and must therefore carry the burden on every element to prevail, *see Schaffer* v. *Weast*, 546 U.S. 49, 56-57 (2005). Thus, courts have uniformly held that "the plaintiff must show that the defendant's acts unnecessarily excluded competition from the relevant market." *California Computer Prods., Inc.* v. *IBM Corp.*, 613 F.2d 727, 735 (9th Cir. 1979) (internal quotation marks omitted); *see Association for Intercollegiate Athletics for Women* v. *NCAA*, 735 F.2d 577, 584 (D.C. Cir. 1984) (plaintiff must prove that "the defendant in fact acquired monopoly power as a result of unlawful conduct"); *United States* v. *Westinghouse, Inc.*, 648 F.2d 642, 649 (9th Cir. 1981) ("The government bears the burden of showing causation."); *see also Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1054 (8th Cir. 2000); *New York* v. *Julius Nasso Concrete Corp.*, 202 F.3d 82, 88 (2d Cir. 2000); *MCI Commc'ns Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983).

Under these principles, the court of appeals correctly concluded that the Commission's order could not stand. The Commission referred to what it called "a *prima facie* showing of a causal link" between Rambus's conduct and JEDEC's decisions incorporating Rambus's technologies into its standards. Pet. App. 149a-150a. As the court of appeals explained, however, the Commission did not find that Rambus's nondisclosures actually caused JEDEC's decisions or otherwise

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[9] *Schwinn* was overruled on other grounds in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

excluded rivals from any market. *Id.* at 150a. The Commission found only that Rambus's nondisclosures led to *either* JEDEC's adoption of Rambus's technologies *or* Rambus's avoidance of a RAND commitment. *Id.* at 14a, 19a. Indeed, the Commission expressly stated that Complaint Counsel had failed to establish, by a preponderance of the evidence, that any improper conduct by Rambus caused JEDEC to adopt Rambus technologies as standards. *Id.* at 284a, 286a. Thus, although the petition states that Rambus obtained a monopoly "[a]s a result of" exclusionary conduct (Pet. 3, 8), the Commission itself made no such finding, and its decision could not be sustained on that basis.

1. The Court Of Appeals Did Not Impose An Excessive Burden Of Causation

The Commission contends that the court of appeals applied an impermissibly onerous concept of causation. Pet. 18-22. That contention rests on a mischaracterization of the court's decision. The court of appeals nowhere denied, as the Commission suggests (Pet. 17-18), that monopoly power might result from several factors, including exclusionary conduct. Nor did the court hold that the Commission had to establish that the defendant's misconduct was the *only* factor contributing to the monopoly. The court concluded only that, because the Commission could not find by a preponderance of the evidence—after a full-scale retrospective examination of the JEDEC process—that JEDEC would have adopted different technologies had Rambus made the disclosures, Rambus's nondisclosures cannot be said to have caused JEDEC to adopt its technologies and thus to have excluded rivals and caused Rambus's monop-

oly.[10] The Commission did not find that Rambus's nondisclosures were either necessary or sufficient to cause JEDEC to adopt the standards it chose.

Moreover, although the Commission states that the court of appeals "did not dispute" that Rambus's nondisclosures were "likely to weigh heavily in JEDEC's choice of technologies for inclusion in the proposed standards" (Pet. 18), the Commission did not find that those nondisclosures in fact weighed heavily in JEDEC's decision. Instead, in its liability opinion the Commission addressed the causation requirement only by requiring a minimal showing of causation—a "prima facie" showing of a mere "causal link" between the alleged conduct and the effect on competition—and then requiring Rambus to *disprove* causation. *See* Pet. App. 149a, 161a. Indeed, the Commission went so far as to require Rambus to prove "inevitability" by establishing that "its patented technologies were superior to all [alternative] technologies" once licensing costs were considered. *See id.* at 163a-164a. The Commission thus, in effect, required Rambus to prove a negative—that its nondisclosures could not have affected the JEDEC standard. No law supports that approach to the causation requirement of Section 2.

The Commission states that "[i]n a case like this," the defendant properly bears the risk of uncertainty (Pet. 14), but the few authorities it cites do not support

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[10] The Court's previous standard-setting antitrust cases involved conduct that affected the decisions of the SSO and thereby excluded rivals. *See Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 496-497 (1987); *American Soc'y of Mech. Eng'rs* v. *Hydrolevel Corp.*, 456 U.S. 556, 560-564 (1981); *Radiant Burners* v. *People's Gas Light & Coke Co.*, 364 U.S. 656, 659-660 (1961).

that assertion. *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949), provides no support for the Commission's Section 2 analysis. The Court's observations about the difficulties of proof of market impact were part of its analysis of the very different Section 3 of the Clayton Act, 15 U.S.C. § 14, which prohibits practices "wherever their effect 'may be' to substantially lessen competition" and thus, the Court said, requires the government to prove only that "competition has been foreclosed in a substantial share of the line of commerce affected," 337 U.S. at 308-314.[11] *See also id.* at 309 (finding Clayton Act violation even assuming "no improvement of Standard's competitive position" and that "Standard does not by itself dominate the market").[12] Moreover, in *Standard Oil*, the government sought to

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[11] *See also* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1800, at 17-18 & n.66 (2d ed. 2005).

[12] Even in the Clayton Act Section 3 context, it is questionable whether *Standard Oil* is consistent with the Court's more recent antitrust jurisprudence. As the Court explained at length (337 U.S. at 304-308), it reached its result in that case largely because of a perceived need to be consistent with *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), where the Court had "rejected the necessity of demonstrating economic consequences" in a tying case under Section 3 when "the volume of business affected is not insignificant or insubstantial." *Standard Oil*, 337 U.S. at 304 (internal quotation marks omitted). But the Court's view of tying in *International Salt* was largely repudiated in *Illinois Tool Works, Inc.* v. *Independent Ink, Inc.*, 547 U.S. 28 (2006). Furthermore, the Court's strict approach to requirements contracts in *Standard Oil* was superseded in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961). One commentator has described *Standard Oil*'s rule of "virtual per se illegality"—*i.e.*, its refusal to require proof that a requirements contract actually caused anticompetitive effect—as "the least defensible part" of that opinion. *See* XI Hovenkamp, *supra*, ¶ 1801, at 50.

enjoin ongoing conduct that might harm competition in the future; here, by contrast, the issue is whether Rambus obtained its monopoly in the past by conduct that ended more than twelve years ago.

As it has before, the Commission relies on a passage in a treatise by Professors Areeda and Hovenkamp to the effect that "exclusionary conduct" should include conduct that " 'reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power.' " Pet. 17 (quoting III Areeda & Hovenkamp, *Antitrust Law* ¶ 651g, at 124 (3d ed. 2008)). As before, the Commission has misconstrued the passage. That passage is directed, not to the *causation* element in monopolization cases, but rather to the antecedent requirement that defendant's *conduct* must be objectionable.[13] On the different and pertinent issue of causation, the treatise says something very different: "*[T]he plaintiff generally has the burden* of ... proving ... that anticompetitive behavior has contributed sig-

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[13] The Commission-cited portions of *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983), and *Microsoft*, 253 F.3d at 79, also addressed the issue of conduct rather than causation, as did cases cited by amici (Hewlett-Packard Br. 11-12; AAI Br. 15 & n.9). None of the cited cases holds that conduct "capable of ... creating" monopoly power is enough for a violation of Section 2, without proof of causation. *Cf. Microsoft*, 253 F.3d at 58-59, 61-62 (separately addressing the conduct and causation requirements and finding that the multifaceted conduct at issue there maintained Microsoft's monopoly by excluding rivals and raising entry barriers). The Commission's petition for rehearing en banc relied heavily on an alleged intracircuit conflict with *Microsoft*, but there is no conflict. Indeed, two of the seven judges on the *Microsoft* en banc court were on the panel below, and six of the seven were included among the eleven who voted to deny the Commission's petition for rehearing.

nificantly to the achievement or maintenance of the monopoly." III Areeda & Hovenkamp, *Antitrust Law* ¶ 650c, at 92-93 (3d ed. 2008) (emphasis added). The Commission did not find that here.

Indeed, Professors Hovenkamp, Janis, and Lemley, in a different treatise, state that in a Section 2 case based on deception of an SSO, "the competitive risk" is that the deception "will cause a standard-setting organization to adopt a standard it otherwise would have rejected." Thus, they conclude, in editions published both before and after the court of appeals decision, that "an antitrust plaintiff *must establish* that the standard-setting organization would not have adopted the standard in question but for the misrepresentation or omission." II Hovenkamp, Janis, & Lemley, *IP and Antitrust* § 35.5, at 35-37 (2009 Supp.) (citing court of appeals' decision), § 35.5, at 35-45 (2007 Supp.) (emphasis added); *see also* Hovenkamp, *Standards Ownership and Competition Policy*, 48 B.C. L. Rev. 87, 105-106, 108-109 (2007).

2. A Section 2 Plaintiff Must Show More Than Disruption Of The Process

Unable to show by a preponderance of the evidence that Rambus's nondisclosures caused its monopoly, the Commission argues that it is sufficient that those nondisclosures "disrupted the competitive process" at JEDEC (Pet. 14), when Rambus did not have monopoly power. This argument is wrong both as a matter of law and as a matter of fact.

As a matter of law, this Court has repeatedly held that objectionable conduct—which by its nature disrupts the competitive process and has the *potential* to injure competition by excluding rivals—does not violate Section 2 unless it actually excludes rivals and

causes a defendant's monopoly (or, in a case of ongoing conduct unlike the case here, threatens to do so). *See, e.g., Spectrum Sports*, 506 U.S. at 459; *Brooke Group*, 509 U.S. at 225-226.

The lower courts have thus consistently held that even affirmative acts of deception, even when undertaken by existing monopolies, do not violate Section 2 unless they are shown to have injured competition. *See, e.g., Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 288 n.41 (2d Cir. 1979) (deceptive advertising not unlawful absent proof that it actually injured competition); *Covad Commc'n Co.* v. *Bell Atl. Co.*, 398 F.3d 666, 674-675 (D.C. Cir. 2005) (same); *Aquatherm Indus., Inc.* v. *Florida Power & Light Co.*, 145 F.3d 1258, 1261 (11th Cir. 1996) (deception by monopoly firm does not violate Section 2 unless it increases defendant's market share or barriers to entry); *see also Dippin' Dots* v. *Mosey*, 476 F.3d 1337, 1346-1347 (Fed. Cir. 2007) (even fraud on patent office violates Section 2 only if patent would not otherwise have issued).[14]

Moreover, the factual premise of the Commission's argument is not supported by the Commission's findings; the Commission's incorrect legal argument is thus inapplicable to the facts found by the Commission, and this case is a poor vehicle for review of that argument. The Commission made no finding that any "competitive process" at JEDEC was distorted by Rambus's nondisclosure. Specifically, the Commission did not find (and

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[14] The general discussions in some of the amicus curiae briefs about the possible consequences of deception in standard-setting are thus immaterial here, where the issue is not whether deception *can* affect competition, but whether the Commission adequately found that it did so in this case.

there is no evidence) that, if Rambus had made the allegedly required disclosures, JEDEC's members would have engaged in a more extensive analysis of competing technologies, JEDEC would have opened the standard-setting process to reexamination or competitive bidding, or JEDEC or JEDEC members would have negotiated with Rambus over licensing terms.[15] To the contrary, the evidence showed that, when JEDEC members disclosed their intellectual property, the disclosure either was ignored or was followed by a RAND commitment with no change to the standard.[16] At most, the evidence and findings suggest that, if Rambus had disclosed its "patent interests," JEDEC would have requested, and Rambus would have given, a commitment to license its technologies on RAND terms, and JEDEC would have adopted Rambus's technologies—just as JEDEC actually did. In short, Rambus's nondisclosures did not affect any "competitive process" attendant to JEDEC's adoption of the standards.

3. The Commission Was Required To Prove More Than That Rambus's Conduct Enabled It To Avoid A RAND Commitment

Because the Commission's order cannot be sustained on the theory that Rambus's nondisclosures excluded rivals, it could be sustained only if the Commission's alternate theory—that the nondisclosures enabled Rambus to avoid a RAND commitment—was suf-

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[15] Indeed, Commissioner Rosch noted that there is no evidence that "JEDEC or its members had ever negotiated a royalty rate" *ex ante* or that "JEDEC or its members even had the expertise to do that." Pet. App. 351a.

[16] Pet. App. 806a-812a.

ficient for a Section 2 violation. The court of appeals correctly concluded that it was not.

As the court of appeals stated, "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition." Pet. App. 16a. The Commission's petition does not dispute that proposition. Rather, the Commission objects to the premise that Rambus was an otherwise " 'lawful monopolist' " (Pet. 23-24). But that premise was clearly correct in this context, given that (as the court of appeals had already observed) the Commission was unable to find that Rambus obtained its monopoly through deception. As this Court explained in *Trinko*, "[t]he mere possession of monopoly power, *and the concomitant charging of monopoly prices*, is not only not unlawful; it is an important element of the free-market system." 540 U.S. at 407 (emphasis added); *see also Berkey Photo*, 603 F.2d at 294 ("Setting a high price may be a use of monopoly power, but it is not anticompetitive.").[17]

The Commission suggests that avoiding a constraint on pricing such as a RAND commitment can it-

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[17] The Commission's glancing citations (Pet. 22) to *California Dental Ass'n* v. *FTC*, 526 U.S. 756 (1999), and *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986), do not aid its case. Those cases involved horizontal agreements by which market rivals reduced competition among themselves, in violation of Section 1, by withholding output. This Court has always treated *agreements* among competitors to restrict their competition as highly suspicious, *see* 476 U.S. at 458-459, but a monopolist (which can unilaterally withhold output) does not violate Section 2 unless it obtained or maintained its monopoly through the unlawful exclusion of rivals because, absent such exclusion, there is no injury to competition.

self be deemed to be the unlawful creation of a monopoly, but that is precisely the proposition that this Court rejected in *NYNEX*. *NYNEX* makes clear that misconduct does not violate the Sherman Act merely because it harms consumers by enabling a firm to charge higher prices; a Sherman Act violation requires proof that the misconduct resulted in "a less competitive market." *See* 525 U.S. at 136.[18] In this case, as in *NYNEX*, the "less competitive market" did not result from misconduct but rather was the result of the *lawful* acquisition of a monopoly—in *NYNEX*, from the company's status as a regulated utility and, in this case, from JEDEC's adoption of Rambus's superior, patented technologies.[19]

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[18] The principal issue in *NYNEX* was whether a buyer's agreement to favor one seller over another for improper reasons violated the *per se* rule against group boycotts. 525 U.S. at 133, 135. This Court concluded that it did not, even though the arrangement in that case allegedly allowed the buyer, a monopoly utility, to charge consumers higher prices by deceiving its regulator. *See id.* at 132. The Court also ruled that a Section 2 claim could not be stated on that basis, because a harmful effect on price was not itself impairment of competition. *Id.* at 139. On remand, the district court found no rule of reason violation for the same reason, among others. *Discon Inc.* v. *NYNEX Corp.*, 86 F. Supp. 2d 154, 163-164 (W.D.N.Y. 2000).

[19] Several lower court cases, some of which the court of appeals discussed (Pet. App. 18a), also hold that schemes to avoid pricing constraints, in both regulated and unregulated markets, do not violate Section 2 where they do not exclude rivals. *See, e.g.*, *Forsyth* v. *Humana, Inc.*, 114 F.3d 1467, 1477-1478 (9th Cir. 1997) (kick-back scheme that caused higher prices); *Schuylkill Energy Res., Inc.* v. *Penn Power & Light Co.*, 113 F.3d 405, 414-415 (3d Cir. 1997) (conduct that violated PURPA and resulted in price increases did not violate Section 2 because it did not "exclude [a] competitor"); *see also Newman* v. *Universal Pictures*, 813 F.2d

The Commission also contends that Rambus's avoidance of a RAND commitment injured competition because JEDEC's requirement of a RAND commitment "was the means by which JEDEC sought to preserve the benefits of *ex ante* competition" (Pet. 25). As discussed above (pp. 8, 22), however, the Commission made no finding that there was or would have been any *ex ante* competition at JEDEC. Moreover, while a RAND commitment does require the patent holder to license the relevant patents on reasonable and nondiscriminatory terms, there is no evidence of what JEDEC understood the royalty constraint to mean, much less any evidence that it was meant to emulate hypothetical, *ex ante* bargaining.[20]

1519 (9th Cir. 1987) (conspiracy to avoid paying sums owed under contract). Neither the Commission nor amici cites any case to the contrary.

[20] Without acknowledging the passage and reasoning in the *IP and Antitrust* treatise that speak directly to the issue presented in this case (*see* p. 20, supra), the Commission quotes a passage from the treatise to the effect that, if "the plaintiff can show that the patent owner would have licensed the patent at a competitive rate" if it had disclosed the patent before the SSO acted "but charged a higher rate because of the nondisclosure," the overcharge can be regarded as competitive harm from the nondisclosure. Pet. 25 n.8. But, as noted, there is no evidence that Rambus would have licensed its technologies at a more competitive rate or that a RAND commitment would have required it to do so. Moreover, the Commission fails to note that the passage it quotes explicitly refers to the situation where the SSO "does not require that [the patents] be licensed." *IP and Antitrust* (2009 Supp.) § 35.5, at 35-47. The passage thus does not apply to the situation here, in which disclosure is used to trigger a RAND commitment and thus an obligation to license the patents.

In any event, the Commission's contention would mean that any deceptive or other conduct that affects prices violates Section 2, even if it does not exclude rivals or otherwise affect market structure. The cases have consistently rejected that contention. *See* p. 21, *supra*.

B. This Case Does Not Merit Review For Other Reasons As Well

The Commission's other arguments for review are also wide of the mark.

1. There Is No Conflict Among The Circuits

The Commission argues that the decision below conflicts with the Third Circuit's decision in *Broadcom* on the issue whether a patentee's avoiding a commitment to license its patents on RAND terms is sufficient by itself to meet the injury to competition requirement of Section 2. As the court of appeals in this case correctly recognized, however, *Broadcom* (which reversed the dismissal of a complaint for failure to state a claim) rested squarely on the allegation that Qualcomm, through affirmative misstatements, "induced" the SSO "to incorporate ... into the" standard a technology it "would not have considered" otherwise. 501 F.3d at 315.[21] In other words, the complaint in *Broadcom* alleged exactly what the Commission was unable to find here—that the alleged misconduct caused the SSO to adopt the defendant's technology in a standard.

The *Broadcom* court did not decide (because it was not at issue, given the posture of the case) that a Sec-

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[21] The court reiterated that point at least six times. *See* 501 F.3d at 304 (twice), 306, 313, 314, 316.

tion 2 claim might be stated merely by alleging that the patentee's deceit had an "impact" on the "competitive standard-setting process" (Pet. 28), without establishing that the misconduct actually caused incorporation of patented technology into a standard. It was that effect—the inclusion of Qualcomm's patented technology in the standard—that gave rise to Qualcomm's monopoly. Rambus's nondisclosure had no such effect.

Although the Commission asserts that the decision below "departed from the causation standard that other authorities support" (Pet. 26), it alleges no other circuit conflict. Instead, the Commission relies for that assertion principally on a passage in a treatise, but as explained above (p. 19), that passage addresses a different issue—whether conduct is exclusionary in nature or "improper"—not the standard of causation. Whether the conduct was improper is not the issue here; it is undisputed that deception *can* cause the creation or maintenance of monopoly. Pet App. 15a. The question here is whether Rambus's nondisclosure *in fact* had that effect, and the Commission did not find that it did.

2. Review Is Not Needed Because Of Possible Inconsistencies In The Future

The Commission suggests that the decision below "is likely to lead to inconsistent results in monopolization cases" in the future (Pet. 26-27). That is a surprising conjecture given the lack of inconsistency with the first one hundred-plus years of Sherman Act jurisprudence.

The Commission also speculates that parties subject to future Commission enforcement actions will seek review in the D.C. Circuit to gain the benefit of that court's decision in this case. That concern is overstated. First, unlike some provisions for judicial review

of agency orders, 15 U.S.C. § 45(c) does not provide for judicial review of all Commission orders in the D.C. Circuit,[22] but lays venue there only if the petitioner "resides" or "carries on business" in the District of Columbia or if the act or practice in question was used there. Many firms will be unable to seek review in the D.C. Circuit under this provision. Further, the Commission, the United States, and private litigants can enforce Section 2 by bringing actions directly in district courts, with appeals to the various regional circuits. *See* 15 U.S.C. §§ 4, 15(a), 53(b). Should another court of appeals disagree with the D.C. Circuit's discussion of causation, this Court could then decide whether that conflict warrants its review of the issue. There is no present conflict.

Moreover, the issue genuinely presented by the Commission's petition is quite narrow—whether a Section 2 violation is established when a fact-finder is unable to conclude by a preponderance of the evidence that alleged deception several years earlier caused an SSO to adopt a particular technology as the standard. That issue has rarely arisen in litigation.

There is no basis for the Commission's exaggerated assertion (echoed by some amici) that, even in the context of standard-setting, the court of appeals' decision "would immunize such deception from antitrust liability in most circumstances" (Pet. 15; *see* Hewlett-Packard Br. 10). The court of appeals did not, for example, question the *Broadcom* court's conclusion that deception can violate Section 2 if it causes an SSO to adopt

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[22] *Compare* 28 U.S.C. § 2343 (venue always proper in D.C. Circuit for challenges to certain other agency actions).

patented technology. Nor did the court of appeals suggest any doubt about this Court's decisions that noted the potential for anticompetitive conduct in standard-setting, especially by collusion among competitors,[23] or about the availability of *other* remedies for deception at SSOs—such as fraud, contract, equitable estoppel, and patent misuse.[24]

The amicus briefs paint with a broad brush in arguing that this case warrants review because of the importance of standard-setting. Although standard-setting is indeed important, this case is highly idiosyncratic because the Commission found only that Rambus violated JEDEC members' unwritten "expectations" of disclosure—not clear SSO rules or policies requiring disclosure—and that Rambus improperly failed to disclose *intentions* to seek patent protection *in the future*—not already-issued patents or even pending claims, and because the Commission expressly could not find that the nondisclosure affected the standards. Thus, the theoretical concerns raised by amici are inapplicable to this case. Some amici are concerned about violations of explicit SSO disclosure rules, usually cov-

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[23] *See Allied Tube*, 486 U.S. at 500; *Hydrolevel*, 456 U.S. at 471.

[24] *See, e.g.*, *Qualcomm Inc.* v. *Broadcom Corp.*, 548 F. 3d 1004 (Fed. Cir. 2008); *Stambler* v. *Diebold, Inc.*, 11 U.S.P.Q. 2d 1709 (E.D.N.Y. 1988); *see also* Hovenkamp, *Standards Ownership*, 48 B.C. L. Rev. at 105 ("doctrines derived from the patent laws or contract law, such as equitable estoppel, generally are more appropriate for addressing" these problems); Scholars Br. 15 ("private ordering" is preferable to antitrust intervention). Such remedies are likely to become more available as SSOs "experiment[]" with new and different policies. *See* Hewlett-Packard Br. 4-5.

ering already-issued or pending patent claims;[25] others are concerned about conduct that prevents *ex ante* competition that would otherwise take place or that interferes with the SSO's choice of standards[26]—none of which the Commission found in this case. Indeed, several of the amici acknowledge that SSO rules vary widely and are changing, which suggests that review by this Court should await further private sector and lower court experience with the issues of concern to amici.[27]

All that is at issue here is whether a firm that obtained a monopoly in part as a result of an SSO's decision to adopt its superior technologies but was *not* found to have obtained the monopoly by means of wrongful conduct, or to have violated any SSO rule, should nonetheless be deemed to have violated Section 2 because it failed to disclose its intentions to file patent

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[25] *See* AMWA Br. 4 (discussing SSO "policy" that addresses disclosure of "relevant member-owned claims"); AAI Br. 9-13 (discussing cases that involved pending or issued patent claims); Scholars Br. 5 (stating that SSOs "frequently adopt by-laws requiring such things as disclosure of patents or patent applications").

[26] *See* Hewlett-Packard Br. 6; Nanya Br. 8-9; Scholars Br. 5.

[27] *See* Hewlett-Packard Br. 4-5; AMWA Br. 21. Moreover, although several amici advert to costs to standard-setting if firms were allowed to capture standards through deception (*see* AMWA Br. 24; Hynix Br. 16), amici also note that SSOs limit disclosure requirements to avoid burdening and thus discouraging participation (AMWA Br. 3-4). Participation would be burdened if firms were required, as a condition to participating in an SSO, to disclose trade secret information about their *future* intentions to file patent claims. *See* note 31, *infra* (none of 43 surveyed SSOs required such disclosure).

claims in the future, allegedly in contravention of a general expectation of good faith. No decision of this Court or any other appellate court addresses such an issue. Should that issue turn out to be significant, it will undoubtedly be subject to appellate consideration in the future. The Commission has failed to show that it warrants this Court's immediate intervention.

C. The Weakness Of The Commission's Case On Deception Further Counsels Against Review

Although the court of appeals found it unnecessary to resolve Rambus's challenge to the Commission's determination that nondisclosure of its "patent interests" contravened JEDEC disclosure expectations, it noted at great length its "serious concerns about [the] strength of the evidence relied on to support some of the Commission's crucial findings regarding the scope of JEDEC's patent disclosure policies and Rambus's alleged violation of those policies." Pet. App. 21a. The court of appeals' deep (and well-founded) skepticism about the factual underpinnings of the Commission's case is another factor counseling against review because, even if this Court were to reverse the court of appeals' legal rulings, it is very likely that the court of appeals would set aside the Commission's order on another ground.[28] At a minimum, that order would be undergoing judicial review until 2010, at which point most of the patents at issue would have expired.[29]

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[28] Rambus raised several other legal challenges to the Commission's order that were not addressed by the court of appeals but would be renewed on remand. *See* Rambus C.A. Br. 31-76.

[29] The principal relief ordered by the Commission was a prospective limitation on the royalties that Rambus could collect un-

The Commission's case against Rambus rests on its contention that Rambus had an obligation to disclose to JEDEC its *intentions* to file or amend patent claims *in the future*. But the Commission did not find that any JEDEC rule required such disclosure, and as the court of appeals explained, the evidence of such an obligation is very thin. At most, JEDEC documents suggested that members should disclose patent claims already issued by or pending in the PTO, but Rambus had no such claims that were pertinent. Pet. App. 21a-22a. In fact, every case that has addressed the question has concluded that JEDEC rules did not require disclosure of future patent intentions.[30] That is not surprising; a study of 43 SSOs did not identify even one that obligated members to disclose mere intentions to file patent applications.[31] Firms routinely treat their intention to seek patent protection as a highly sensitive trade secret. If JEDEC had required its members to disclose such trade secrets, one would expect the obligation to have been unmistakably clear.

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der certain patents for the manufacture, sale, or use of certain JEDEC-compliant products. *See* Pet. App. 370a-371a; *see also id.* at 371a-372a. The Commission did not seek a stay of the mandate after the court of appeals issued its decision. Thus, even if the Commission were to prevail on remand, its order could affect only royalties collected between the date of a new order after remand and the expiration of the patents.

[30] *See Infineon*, 318 F.3d at 1098; *Hynix Semiconductor Inc.* v. *Rambus Inc.*, 441 F. Supp. 2d 1066, 1074 (N.D. Cal. 2006); *Micron Tech., Inc.* v. *Rambus, Inc.*, No. Civ. A. 00 792, 2006 WL 1653136, at *2 (D. Del. June 15, 2006); *see also* Pet. App. 620a-622a.

[31] *See* Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1904-1905, 1973-1975 (2002).

Although no JEDEC rule required disclosure of future patent intentions, the Commission found a disclosure obligation on the basis of JEDEC members' general "expect[ations]" of "good faith." (*See* pp. 7-8, *supra*.) But, as the court of appeals explained (Pet. App. 23a-24a), resting such a momentous disclosure obligation on the subjective and vague "expectations" of commercial rivals would be perilous. Indeed, the Commission did not identify any details of those expectations (*e.g.*, what kinds of intellectual property were covered, the relationship between the patent interest and the proposed standard that triggered the duty, the timing of the required disclosure, or what kind of disclosure would have satisfied the duty). The Commission's expectations theory fails to " 'define clearly what, when, how, and to whom the members must disclose.' " Pet. App. 24a (quoting *Infineon*, 318 F.3d at 1102).[32]

Although the court of appeals did not find it necessary to resolve definitively whether Rambus failed to comply with any JEDEC disclosure obligation, its discussion of the record strongly suggests that it would reverse the Commission on that ground. Thus, even if the legal questions presented by the Commission's petition might in some other case warrant this Court's attention, it is unlikely that the Court's resolution of them would affect the ultimate outcome of this case.

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[32] After a lengthy trial that largely replicated the trial in this case, a jury found that JEDEC members did *not* share expectations that members would disclose information about patent applications or intentions. *See Hynix Semiconductor, Inc.* v. *Rambus Inc.*, Nos. C-00-20905, C-05-00334, C-06-00244, 2008 WL 2951341, at *2-3 (N.D. Cal. 2008). Several of the amici here were losing parties in that case and are, in effect, seeking to win here what they lost in their own litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2009